In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-43

FREDERICK COHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1972. The petition for a writ of certiorari was filed on July 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial judge not to summarize and "particularize" the evidence.

2. Whether the trial judge improperly curtailed the cross-examination of a co-conspirator as to expectations of leniency.

STATEMENT

After trial by jury in the Southern District of New York, petitioner was convicted of unlawfully transporting a stolen security in interstate commerce, in violation of 18 U.S.C. 2314, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to imprisonment for two years. The court of appeals affirmed.

Since the petition does not set forth all the relevant evidence against petitioner, we state it here in some detail. The evidence at trial showed that Dominick Forte, a government witness, approached William Burke, who was also a government witness, concerning the disposal of $250,000 worth of stolen U.S. Treasury bills which he did not think were "hot" since "nobody will look for [them] * * * for three years" (Tr. 53-56, 404-405).[1] Burke obtained one original $50,000 bill and copies of others (Tr. 72, 409-410).

On January 24, 1971, Burke took the genuine bill to the home of Charles Mehrmann, who placed a call

[1] Forte had been supplied the bills by co-defendant Morton Michaels, who had obtained them from co-defendant Tony Rallo (Tr. 404-405, 411-412).

to petitioner, an associate of his law firm (Tr. 80-84). Burke told petitioner that the bills could be purchased for 30 per cent of face value and that the profit on resale by petitioner would be split three ways (Tr. 88).[2]

At a subsequent meeting between Burke and petitioner, Bernard Hall, a partner in Mehrmann's law firm, refused to have anything to do with the bill unless he could get an affidavit of ownership from Burke (Tr. 93). Petitioner later told Burke that Hall was too cautious and that he had already made arrangements to cash the bill (Tr. 95-96).

On February 3, petitioner went to Baltimore to try to sell the bill but was unsuccessful (Tr. 295). In New York, he arranged the sale of the $50,000 bill through Sidney Grant, to whom he promised $10,000 for selling the bill on a "green deal," *i.e.*, all cash and no receipts (Tr. 289-292, 317-323, 356-357).

Late in the afternoon of February 3, petitioner told Burke he would have $10,000 for him the next day, and the balance the following week (Tr. 118). Petitioner did bring Burke $7,500 on February 4, and the two discussed how to use the money they expected to get and how to dispose of other bills. Petitioner said the next batch would have to be moved in Europe (Tr. 119-124). Burke gave Forte $7,200 (Tr. 125).

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[2] Burke testified that Mehrmann did not participate in the conversation after the introduction (Tr. 153-154). Mehrmann testified that he was present most of the time and that Burke assured him that the bill was not stolen (Tr. 499-500).

Petitioner was arrested on February 4 at Grant's office by an F.B.I. agent posing as a banker, after petitioner revealed that he had other bills to cash (Tr. 274-275).

ARGUMENT

1. In light of the evidence, it is clear that, contrary to petitioner's contention (Pet. 7-8), the trial judge did not act unfairly in failing to summarize the evidence. The trial judge stated that the trial had been a short one and that the jury had heard the summations of counsel, in which they pointed out the portions of the proof on which they urged the jury to rely. He therefore saw no reason to further detail the contentions of the parties or the specific proof (Tr. 776). While Michaels and Rallo were on trial with petitioner, and some of the evidence related to them, their part in the conspiracy consisted of supplying the bill and the photostatic copies of the other bills to Burke and receiving the proceeds. Despite petitioner's attempt to portray himself as a minor figure in the events, the major part of the evidence pertained to his dealings with Burke and his attempts to pass the bill. Under the circumstances, therefore, summarization of the testimony as to petitioner alone was unnecessary.[3]

2. During cross-examination of Burke, he testified that no promise had been made to him for his

[3] Petitioner suggests (Pet. 8) that his prosecution could have been severed from that of his co-defendants, but apparently does not contend that denial of severance was erroneous or even that severance was ever requested.

testimony (Tr. 166). He was asked whether, in his presence, his attorney had asked the Assistant United States Attorney about Burke's chance of going to jail (Tr. 167). The following then occurred (Tr. 167):

> THE COURT: Let's get something straight. In the Federal Court nobody makes any deals regarding sentences, and the Assistant United States Attorney cannot make any recommendations to me as to what sentence I will impose.
>
> MR. LEFKOWITZ: That may be before your Honor. But it is done with other judges.
>
> THE COURT: In the Federal Court in the Southern District of New York, every one of the 24 judges—
>
> MR. LEFKOWITZ: I am not going to argue with the Court, but I am practitioner of this court.
>
> THE COURT: Okay.
>
> Q. In any event, you didn't ask, did you?
>
> A. No. And my attorney didn't ask. He did not ask Mr. Horowitz, in my presence.

Burke was then cross-examined at length as to discussions with the Assistant United States Attorney as to possible disbarment (Tr. 183-184); as to his interview with an F.B.I. agent (Tr. 197-201); and as to his hope of consideration for his cooperation (Tr. 234). Burke again testified that there had been no discussion with the prosecutor about a likely sentence (Tr. 236) but did testify that another Assistant United States Attorney told him that con-

spiracy was not considered a felony in state courts and thus not a ground for automatic disbarment (Tr. 238-240).

The judge's statement of which petitioner complains (Pet. 11) merely brought out to the jury that there could have been no agreement as to sentence. Contrary to petitioner's contention (Pet. 9-11), as can be seen from the above exchange and the cross-examination allowed thereafter, the judge did not curtail the right of the defense to cross-examine Burke as to any expectations of consideration in return for his testimony. Thus there was no violation of petitioner's right to confront the witnesses against him.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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